

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-64 ✓

In re Applications of

WIND 'N SEA FM LIMITED File No. BPH-901224ME
PARTNERSHIP
(hereafter "Partnership")

WEBB File No. BPH-901224MF
BROADCASTING, INC.
(hereafter "Webb")

ARIS MARDIROSSIAN File No. BPH-901224MI
(hereafter "Mardirossian")

EQUAL TIME File No. BPH-901224MK
BROADCASTING CORP.
(hereafter "Broadcasting")

J.H. COMMUNICATIONS File No. BPH-901226MB
(hereafter "Communications")

For Construction Permit
for a New FM Station on Channel 295A
in Ocean City, Maryland

HEARING DESIGNATION ORDER

Adopted: March 23, 1992;

Released: April 13, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.¹

2. *Short Spacing.* An engineering review of the Webb, Partnership and Communications applications reveals the following:

(1) The Partnership proposal is 8.2 kilometers (km) short-spaced to WKDN(FM), Camden, NJ; 4.2 km short-spaced to construction permit BPH-880727MC, North Cape May, NJ; 6.4 km short-spaced to WQMR(FM), Federalburg, MD; and 2.2 km short-spaced to WAFX(FM), Suffolk, VA.

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(2) The Webb proposal is 7.6 km short-spaced to WKDN(FM), 3.6 km short-spaced to construction permit BPH-880727MC, 5.8 km short-spaced to WQMR(FM), and 7.4 km short-spaced to WAFX(FM).
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(3) The Communications proposal is 12.7 km short-spaced to WKDN(FM), 9.5 km short-spaced to construction permit BPH-880727MC, and 6.2 km short-spaced to WQMR(FM).
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3. These short-spacings are in violation of 47 C.F.R. § 73.207. In this regard, Webb requested processing under 47 C.F.R. § 73.213(c)(1) with respect to all of them. Communications requested processing pursuant to 47 C.F.R. § 73.213(c)(1) with respect to WKDN(FM) and WQMR(FM).² Partnership failed to address this problem; however, its application meets the spacing requirements of 47 C.F.R. § 73.213(c)(1) with respect to all the stations.

4. A review of the applications reveals that the instant allotment (for Channel 295A in Ocean City, MD) is itself in violation of 47 C.F.R. § 73.207. Specifically, this allotment is 3.1 km short-spaced to WKDN(FM), 1.1 km short-spaced to construction permit BPH-880727MC, and 1.4 km short-spaced to WAFX(FM). However, the Ocean City allotment is not short-spaced to WQMR(FM). Therefore, 47 C.F.R. § 73.213(c)(1) cannot be applied to the required separation distance to WQMR(FM).

5. In clarifying its existing policy regarding short-spaced Class A allotments, the Commission recently amended Section 73.213(c) of the Rules to provide explicitly that:

If the reference coordinates of an allotment are short-spaced to an authorized facility or another allotment (as a result of the revision of Section 73.207 in the *Second Report and Order* in MM Docket No. 88-375), an application for the allotment may be authorized, and subsequently modified after grant, in accordance with paragraph (c)(1) or (c)(2) of this Section *only with respect to such short spacing.*

Memorandum Opinion and Order, MM Docket 88-375, 6 FCC Rcd 3417, 3424-3425 (1991) (emphasis added). See *id.* at 3418 n.7.

6. We acknowledge, however, that prior to the release of that *Memorandum Opinion and Order*, the policy discussed above regarding "grandfathered" stations or allotments may have been somewhat unclear. In particular, we find that return of the applications with no opportunity to correct the defect would be inappropriate, because the applicants did not, for "hard look" processing purposes, have full and explicit notice of the prerequisites they must meet to avoid summary dismissal. Compare *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985) (dismissal inappropriate where rules are unreasonably ambiguous) with *Malkan FM Associates v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991) (dismissal affirmed where rules are clear). Instead,

¹ A competing application (File No. BPH-901226MA), filed by Bruce D. Blanchard Limited Partnership, was dismissed for failure to pay a required fee. An appeal of the dismissal has been filed with, and is currently pending before, the Commission's Office of Managing Director.

² Communications also requested processing pursuant to 47

C.F.R. § 73.215, and waiver of 47 C.F.R. § 73.207, with respect to BPH-880727MC. Because its application satisfies the requirements of 47 C.F.R. § 73.215 with respect to BPH-880727MC, Communications' request for waiver of 47 C.F.R. § 73.207 is HEREBY DISMISSED as unnecessary.

Partnership, Webb, and Communications will be required to file a curative amendment with the presiding Administrative Law Judge pursuant to 47 C.F.R. § 73.3522(b).³

7. *Environmental.* Our engineering study based upon OST Bulletin No. 65, October, 1985 entitled "Evaluating Compliance with Specific Guidelines for Human Exposure to Radiofrequency Radiation" reveals that Broadcasting, Partnership and Communications did not address the matter of how they would protect workers on their respective towers from RF radiation exposure. See 47 C.F.R. § 1.1307(b). Consequently, we are concerned that Broadcasting, Partnership and Communications may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). See also *Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 28, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure to workers exceeding specific standards. Since Broadcasting, Partnership and Communications failed to indicate how workers engaged in maintenance and repair on the tower would be protected from exposure to levels exceeding the ANSI guidelines, the applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. See generally OST Bulletin No. 65, *supra*, at 28. Accordingly, Broadcasting, Partnership and Communications will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of the respective proposals. See 47 C.F.R. § 1.1308(d).

8. *Petition to Deny.* On October 28, 1991, a Petition to Deny was filed against the Webb application by Robert L. Purcell, former licensee of AM Station WDMV,

Pocomoke City, Maryland. In his petition, Purcell questions Webb's certification of its financial ability to build and operate the proposed station. Specifically, Purcell states that on May 29, 1987, pursuant to FCC consent, WDMV was sold to Five Star Broadcasting, Inc. ("Five Star"). The owners of Five Star, asserts Purcell, include Sidney Friedman, Franklyn Field and Anthony Guida, all of whom are principals in Webb and are listed as sources of funds for Webb. The petition alleges that Five Star, and its principals, defaulted in payments to Purcell pursuant to a promissory note given in connection with the sale, and that Purcell has filed a complaint in state court to enforce the note. On November 13, 1991, Webb filed an opposition and averred that Five Star has denied the allegations in Purcell's complaint.⁴ By letter of December 6, 1991, Purcell declined to file a reply.

9. The public notice of the acceptance of Webb's application for filing was released on March 11, 1991. The last date for filing petitions to deny was April 12, 1991. The instant pleading was thus filed too late to be considered as a formal petition to deny. See 47 C.F.R. §§ 73.3573(g)(3), 73.3584(a). Nevertheless, we will consider it as an informal objection to grant of the Webb application. See 47 C.F.R. § 73.3587.

10. The matters raised by Purcell are insufficient to raise a *prima facie* question as to Webb's financial certification. In particular, Purcell has not specifically alleged that any of the named Webb principals are individually liable on the note and are unable to meet their funding commitments to Webb. Indeed, our review of the attachments to Purcell's petition reveals that: the promissory note was made by Five Star; Purcell's state court complaint names Five Star as defendant; and that security for the note consists of the real and personal property of WDMV and an escrow of the capital stock of Five Star. None of the individual principals-financiers of Webb are named individually as maker, guarantor, or defendant. In addition, although Purcell's petition states that principals of Five Star "repeatedly told Purcell that they simply cannot afford to make payments to him," Purcell Petition at 2, he did not identify these principals and did not support the allegation with a personal knowledge affidavit. Accordingly, we deny the Purcell petition.⁵

11. *EEO.* The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Webb has filed such statement, it is deficient. Page 2 of Webb's statement is missing. However, this omission does not affect the tenderability or acceptability of Webb's application.

³ Our engineering study has revealed that processing pursuant to 47 C.F.R. § 73.215 with respect to WQMR may be a viable option for these applicants.

⁴ Also on November 13, 1991, Webb filed a "Motion to Dismiss" the Purcell petition. Additionally, on November 14, 1991, Webb, Five Star, *et al.* filed a "Joint Motion for Sanctions" against Purcell and his counsel. In light of the action taken below, we need not reach these pleadings.

⁵ The Commission has long held that it "has neither the authority nor the machinery to adjudicate alleged claims arising

out of private contractual agreements." *Transcontinent Television Corp.*, 21 RR 945, 956 (1961). This agency is not the proper forum for the resolution of private disputes, and interested parties, should they deem it advisable, should seek redress (as Purcell has apparently done) in a local court of competent jurisdiction. *John F. Runner, Receiver*, 36 RR 2d 773, 776 (1976). While sharing some common principals, Five Star and Webb are separate entities. Nevertheless, we emphasize, Webb will be bound by the representations, financial and otherwise, made in its application.

However, Webb will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

12. *Attribution.* In response to Item 6, Section II of FCC Form 301, Webb states that Michael M. Reitman and Anthony Guida, employees of the National Broadcasting Company, and Franklyn Field, an employee of CBS, Inc., "are neither shareholders, officers nor directors" of those respective organizations (Exhibit 1). Webb shall provide the specific positions held by these individuals, who are also "non-voting" stockholders of Webb.

13. *Air Hazard Issue.* Since no determination has been received from the Federal Aviation Administration as to whether the antennas proposed by Webb and Broadcasting would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

14. *Late-Filed Amendments.* The applicants below have petitioned for leave to amend their applications. The accompanying amendments were filed after March 25, 1991, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the following amendments are accepted for filing:

APPLICANT	DATE(S) FILED
Webb	6/24, 12/11/91, 1/3/92
Mardirossian	6/3/91
Broadcasting	5/16/91
Communications	4/5/91.

In addition, Partnership and Mardirossian petitioned for leave to amend their applications on July 15, 1991 (supplemented July 22, 1991) and November 29, 1991, respectively, after the last day for filing amendments as of right. These amendments, dealing mostly with engineering, were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, they are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from any of the above amendments will be disallowed.

15. *Comparative Coverage.* Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

16. *Conclusion.* Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

17. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Partnership, Broadcasting and Communications in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301- 1319.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Webb and Broadcasting would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

18. IT IS FURTHER ORDERED, That Partnership, Webb and Communications shall file the amendments, specified in Paragraph 6 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

19. IT IS FURTHER ORDERED, That in accordance with paragraph 7 hereinabove, Partnership, Broadcasting and Communications shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

20. IT IS FURTHER ORDERED, That the Purcell Petition to Deny IS HEREBY DENIED.

21. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Webb shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

22. IT IS FURTHER ORDERED, That Webb shall file the amendment, specified in Paragraph 12 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

23. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

24. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Partnership (7/15 supplemented 7/22/91), Webb (6/24, 12/11/91, 1/3/92), Mardirossian (6/3, 11/29/91), Broadcasting (5/16/91) and Communications (4/5/91) ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated in paragraph 14 above.

25. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on

the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

26. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157,160-1,166,168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

27. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau